CALIFORNIA CENTRAL VALLEY
FLOOD CONTROL
ASSOCIATION

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DELIVERED VIA EMAIL: DLIS_NOP_comments@deltacouncil.ca.gov

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SUBJECT: Delta Levee Investment Strategy Policy EIR – Notice of Preparation

The California Central Valley Flood Control Association (CCVFCA/Association) appreciates the opportunity to comment on the Draft Environmental Impact Report (EIR) for the Delta Levee Investment Strategy Policy (DLIS Policy Project) as outlined in the Notice of Preparation (NOP). The Association recommends that public safety be the primary objective for guiding a State investment prioritization strategy for Delta levees (Proposed Project), and offers the following specific comments in terms of the future scope and content of the Proposed Project.

Established to promote the common interests of its membership in maintaining effective flood control systems for the protection of life, property, and the environment, the Association has been actively involved in advancing and advocating for effective flood management throughout the Central Valley, including the Delta since 1926. Today, CCVFCA represents more than 75 local levee maintaining agencies (LMAs/RDs) with flood control responsibilities, including along the Sacramento and San Joaquin Federal Project and non-project levee systems within the Sacramento-San Joaquin Delta. Therefore, many of our members will be greatly affected by the actions, projects and plans the Council recommends in a long-term strategy for prioritizing the State's future investment in Delta levees.

Flood Protection Is Paramount

A message too often lost in the Delta planning process is the fundamental significance of flood protection. The Delta's comprehensive interconnected system of levees is absolutely critical to public health and safety, including the protection of the region's transportation, agriculture,

business, homes, and even water conveyance.[1] Levees provide this protection at all times, during two daily high tides and seasonal high-flow events. As most public agencies within the Delta are constantly upgrading their level of flood protection, it is essential that DLIS does not create a new barrier to future ability to increase local level of flood protection.

The Proposed Project should include a strong commitment to mitigating any and all such impacts the DLIS priorities and projects may have on reducing the level of flood protection. In general, water levels along a floodway introduced or increased due to levee breaching for habitat projects or failures due to discontinued State funding will require the adjacent levees to be raised, and changes in hydraulics will require increased armoring of levees. These increased costs must be covered by the State as mitigation for impacts caused by implementation of an investment prioritization strategy.

By way of example only, several proposals have been made to install habitat projects within the Yolo Bypass. Vegetation along or in a floodway influences hydraulics and reduces water velocity. Although the Bypass levees were designed with five or more feet of freeboard, water levels rose to within a foot of overtopping in 1986, meaning habitat restoration projects in the Bypass would invariably require levee improvements as mitigation, particularly given that the Bypass levees protect substantial lands on either side of the Bypass, including the City of West Sacramento and thousands of acres of productive farmland and natural and developed habitat.

For decades, levee improvement projects in the Delta, via the Delta Levees Program mentioned earlier, have been required to include multi-benefits such as environmental improvements. Given the paramount need to protect public health and safety, the Council should ensure that every action, project or plan it approves or undertakes use the same multi-objective requirements that levee projects are currently required to achieve. This would mean that all projects implemented under DLIS, including habitat restoration projects to meet water supply reliability co-equal goal, incorporate some incremental improvement to the flood protection and control system, just as levee projects have been required to incorporate improvements to the environment in order to be considered for approval.

The Proposed Project should avoid increasing the regulatory burden and costs of implementing annual maintenance, accessing Subventions Program funding, or qualifying for other State levee improvement funding programs. As pointed out in the Delta Protection Commission's Economic Sustainability Plan (ESP), each of the Delta islands' levees contribute to the protection of different assets and societal values and the local residents have been doing their part for more than a century to maintain this flood control system. Therefore, the State's strategy should reward their good behavior, not penalize them, because it is in the State's best interest to encourage the continued leadership that the local Delta districts provide in planning, designing, and constructing levee improvements, providing daily levee maintenance, and advocating for landowner approval of assessment amounts necessary to fund local flood protection activities.

[1] DWR *A Framework for Department of Water Resources Integrated Flood Management Investments in the Delta and Suisun Marsh* (September 24, 2013)

As concluded by the ESP, the acknowledgement of the federal fiscal incentives, public safety benefits, and long-standing agreement to build Delta levees up to the PL 84-99 minimum standard over time means the key question today is not *what standard should the State invest in?* Instead, the question is *where should levees be improved to an even higher engineering standard to advance State interests such as ecosystem enhancement and hazard reduction with seismic strengthening?*

HISTORICAL BACKGROUND OF FLOOD CONTROL

Reclamation in the California Central Valley

The Delta's flood control system is what allows productive agriculture, safe communities, world-class water recreation, protection of critical transportation and utility infrastructure, reliable statewide water supply, and unique natural resources supporting a diversity of fish and wildlife.

Historically, more than 40 percent of Northern California's runoff flowed to the Delta via the Sacramento, Feather, San Joaquin, and Mokelumne Rivers, with peak winter flows resulting in substantial flooding in the valley floor about every ten years.

In its natural condition, about one-quarter of the Central Valley extending along more than 14 counties was subject to annual or periodic overflow, so the first flood-control projects were the low levees the farmers built to protect their lands from inundation. Flood damage in the Sacramento Valley and Delta occurs almost entirely from rain floods, principally on Sacramento, Feather, Bear, Yuba, and American Rivers as well as Stony, Cache, and Putah Creeks, with smaller creeks also causing localized flooding. The Delta also experiences damaging floods along the San Joaquin River and its tributaries including the following stream groups: Mokelumne River, Calaveras River, Littlejohn Creek, Merced County, Madera County, and Fresno County. Currently, most snow-melt run-off is stored or diverted for beneficial uses or drains to the ocean, but prolonged high-water stages can cause seepage through levees if they are not vigilantly maintained and improved to withstand the occasional flood event with excessive run-off draining through the Central Valley and Delta.[2]

In 1850 Congress approved the Arkansas Act granting several states title to all of the Swamp and Overflowed Lands, including approximately 2 million acres in California. [3] The State considered the reclamation of these swampy lands essential because of their extraordinary fertility when drained (reclaimed) and also because they posed a significant public health risk due to outbreaks

[2] United States Dept. of the Interior, *Central Valley basin; a comprehensive report on the development of the water and related resources of the Central Valley basin for irrigation, power production and other beneficial uses in California, and comments by the State of California and Federal agencies.* [Washington, U. S. Govt. Print. Off.] 1949.

[3] Arkansas Swamp Lands Act, Act of September 28, 1850, codified at California Public Resources Code Section 7552, 7552.5.

of malaria from the mosquito breeding. The State and Federal government therefore proceeded to actively encourage the reclamation of these lands for purposes of productive farming.

The Sacramento Valley and Delta now receives a substantially higher level of flood protection. Authorized by Congress in 1917, the Sacramento River Flood Control Project (SRFCP) is a system of "Project levees" and flood bypasses designed and built by the U.S. Army Corp of Engineers (USACE/Corps) so the individual segments and elements will function as integrated flood control components to facilitate farming and protect people and property in the Central Valley Basin, including the San Joaquin River tributaries.

In a 1949 Progress Report to Congress on the development of the Central Valley Project, the U.S. Interior and USBR acknowledged the importance of giving "full consideration to the needs for flood control and the necessity for coordinated operation of reservoirs, canals, and channel improvements to that end."

Complex System of State Public Works

The SRFCP consists of leveed channels along natural waterways, supplemented where necessary by leveed bypass channels which serve as relief valves to carry surplus flows that the natural rivers cannot accommodate. There are more than 1,600 miles of State-federal Project levees in the Central Valley, 385 miles of which are located in the Delta. More than 700 miles of additional Delta levees are classified as "non-project." The key component of the SRFCP system, the Yolo Bypass, carries 80 percent of the water at the latitude of Sacramento during extreme floods.[4]

Collectively, the facilities, lands, programs, conditions, and mode of O&M for the State-federal flood protection system in the Central Valley are referred to as the State Plan of Flood Control (SPFC).[5] This comprehensive system of levees, bypasses, weirs, channels, and pumping plants is the largest flood management system in California and was designed for three purposes:

1) Flood control;
2) Reclamation of marshy lands for farming and other productive uses;
3) Improvement of navigation.

In 1953, the SPFC works were transferred to California with a memorandum of understanding (MOU) confirming the State's obligation to operate and maintain all completed works/facilities and to hold the federal government harmless.[6] For the Sacramento River and tributaries, the Corps requires the State to maintain the channels to pass the design flows at stages at or below

[4] Flood SAFE California, flyer, State Plan of Flood Control Descriptive Document (2012). Available at http://www.cvfpb.ca.gov/CVFPP/05_CVFPP-SPFC-DD-11212.pdf

[5] Public Resources Code (PRC) Section 5096.805 (j). A complete description of these assets and resources has been compiled by DWR into the *State Plan of Flood Control Descriptive Document*, available at http://www.water.ca.gov/cvfmp/docs/DRAFT_SPFC_Descriptive_Doc_20100115.pdf

[6] 1953 Memorandum of Understanding (USACE and The Reclamation Board, 1953) and Supplements. Available at ftp://ftp.water.ca.gov/mailout/CVFPB%20Outgoing/Orientation%20Materials/Item%203C%20-%20LM%20Assurance%20Agreements/Example%201%20-%20srfcp_mou_1953%20--%20jsp%20copy.pdf.

the 1957 design profile.[7] In addition, the State has signed assurance agreements with the U.S. Army Corps of Engineers to maintain the San Joaquin River Flood Control Project in accordance with the 1955 MOU.

Jurisdiction and authority throughout the drainage basin and for the 1.7 million acres within the state's Sacramento and San Joaquin Drainage District (SSJDD) is the responsibility of the Central Valley Flood Protection Board (CVFPB/Board).[8] Created by State legislation in 1913, the SSJDD holds the property rights on about 18,000 parcels of SPFC lands, some going back to 1900.[9]

FLOOD CONTROL JURISDICTION

Compatibility with Flood Control Objectives

Under California law, no modification to the SPFC system (encroachment or project) may be constructed on or near the Sacramento and San Joaquin Rivers or their tributaries until plans have been reviewed and the projects have been approved or issues a permit by the Central Valley Flood Protection Board.[10]

The CVFPB requires permits for any project that may affect how the SPFC functions, including any encroachments that:

1) Are within State-federal flood control project levees and within a Board easement;
2) May have an effect on the flood control functions of project levees;
3) Are within a Board-designated floodway;
4) Are within regulated Central Valley streams listed in the Board's Title 23 regulations.[11]

The CVFPB meets at least monthly to consider individual projects submitted by landowners and other entities with a project proposing SPFC encroachment and to implement additional projects related to their overall Strategic Plan for the maintenance and improvement of the federal/State flood control system.[12] To reduce the risk of flood damage, the Board manages the Central Valley's floodways by protecting levees from erosion, controlling encroachment into floodplains and on flood control works, and by cost-sharing the State's responsibilities for maintenance and

[7] Central Valley Flood Protection Board *Flood Control System Status Report* (summary document) Available at http://www.cvfpb.ca.gov/CVFPP/04_CVFPP-fcssr-broc-11212.pdf; Central Valley Flood Protection Board webpage, "Flood Control System Status Report." Available at http://www.cvfpb.ca.gov/profiles/index.cfm
[8] Authority rests in the Flood Protection Board pursuant to assurance agreements with the USACE and the USACE Operation and Maintenance Manuals under Code of Federal Regulations, Title 33, Section 208.10 and United States Code, Title 33, Section 408
[9] Central Valley Flood Protection Board webpage, "Sacramento-San Joaquin Drainage District Jurisdiction Maps." Available at http://www.cvfpb.ca.gov/cvfpb/ssjdd_maps/
[10] Central Valley Flood Protection Board , A Century of Progress: Central Valley Flood Protection Board 1911-2011 (2011). Available at http://www.cvfpb.ca.gov/Publications/DWR100Years_05.pdf
[11] Title 23 Section 112 "table 8.1 - Regulated Streams and Nonpermissible Work Periods
[12] Central Valley Flood Protection Board Strategic Plan (2013) Available at http://www.cvfpb.ca.gov/strategicplan/2013/9012013_CVFPB_Strategic_Plan.pdf

construction of improvements to the system with the USACE and local landowners. Annual inspections of the SPFC levee system are conducted twice annually by DWR.[13]

The Board authorizes use of the SPFC facilities by issuing encroachment permits only *if the project is compatible with the flood system and will not hamper the State's O&M responsibilities.* The Board's statutory responsibility and implementation of regulations to enforce their authority and jurisdiction over levees and the floodways should be a State priority in a Delta Levee Investment Strategy – a.k.a. Proposed Project.

When an improvement to any feature of the SPFC system is completed, the Board accepts responsibility for the project, but transfers the daily operation and maintenance (O&M) duties to a local agency such as: reclamation and levee districts or joint power authorities that also include cities and counties with flood management responsibilities such as Sacramento Area Flood Control Agency (SAFCA).

The CVFPB also reviews, approves, and enters into funding agreements under the Delta Levee Maintenance Subventions Program to "preserve the physical characteristics of the Delta essentially in the present form" and involves more than 60 local reclamation districts in the Delta and Suisun Marsh to maintain, plan, and complete levee maintenance projects to improve the flood control system and provide protection to public and private investments in the Delta including water supply infrastructure, agricultural production, and ecosystem habitat.

Role of Local Levee Maintaining Agencies

California reclamation districts (RDs) are legal subdivisions of the State responsible for managing and maintaining the levees, channel embankments, drainage canals, pumps, and other flood protection structures.[14] Each RD is autonomous in its responsibilities and is generally managed by an elected board of trustees from eligible landowners and funded by assessments levied on parcels of State and private property.[15]

With very limited exceptions, California law grants local districts with immunity from suit for liability associated with levee failure or other types of flood damage.[16] Even if a local district

[13] 2013 Inspection and Local Maintaining Agency Report of the Central Valley State-Federal Flood Projection System (providing that "DWR, under the authority of Water Code § 8360, § 8370, and § 8371, performs a verification inspection of the maintenance of the SRFCP levees performed by the local responsible agencies, and reports to the USACE periodically regarding the status of levee maintenance accomplished under the provisions of Title 33, Code of Federal Regulations (CFR), Section 208.10. While there are no specific water code provisions directing DWR to inspect and report on Maintenance of the San Joaquin River Flood Control System, DWR has performed inspections and provided reports for many years as a matter of practice that is consistent with Title 33, CFR.") Available at http://cdec.water.ca.gov/current_reports.html.

[14] Cal. Wat. Code § 50000 et seq.

[15] *Id.*

[16] *See generally* Gov't Code § 810 et seq.

has been negligent in conducting O&M, and that negligence is associated with a levee break, a damaged landowner may still not be able to recover.[17]

The reason for district immunity is simple: the law is intended to encourage the formation and continued existence of districts in order to maximize flood control projects. If local districts were financially responsible for all flood damage in their jurisdictions, they would be quickly dissolved, leaving landowners to maintain their own levees—a virtually impossible task without a centralized, competent staff, engineering consultants, heavy equipment, and a stable funding source.

STATE LIABILITY

Risk of Liability Exposure

Modifications to a bypass or to a levee system can have impacts in other areas of the system outside of the Project Area, and modifications of the surface water or soil can affect the ability of the system to deflect, carry, divert, and otherwise deal with flood flows.

Under inverse condemnation laws, the state of California is liable for damages to people or property, particularly where it has altered or modified public works. Inverse condemnation liability gives private individuals a pathway to recover for disproportionate damages caused by public improvements projects.[18] Pursuant to the "acceptance doctrine," any public entity with "power to control or direct the aspect of the public improvement that is alleged to have caused the injury" to plaintiffs will be held liable.

After the 1986 flood, a lawsuit involving some 3,000 plaintiffs claiming damages from a SPFC Project levee failure which resulted in evacuations, deaths, and hundreds of millions of property damage was filed against the State (*Paterno v. State of California*).[19]

In 2003, the State of California settled the case for $467 million after the Third Appellate Court concluded in an appeal of the inverse condemnation lawsuit that the State was liable as the party responsible for the SRFCP facilities. The ***court agreed that the Paterno plaintiffs' damages were "directly caused by an unreasonable State plan which resulted in the failure" of the levee***, therefore finding the State liable to pay for these damages.[20] [emphasis added]

Some of the issues raised in the *Paterno* decision regarding the State's responsibility for liability included whether: 1) the public should pay the costs inherent in public works, including damages, foreseeable or not; 2) the system, as designed, constructed, operated, and maintained, exposed plaintiff to an "unreasonable" risk of harm; 3) the location and configuration of the

[17] *See, e.g., Kambish v. Santa Clara Valley Water Conservation District,* 185 Cal.App.2d 107 (1960); *Tilton v. Reclamation Dist. No. 800,* 142 Cal.App.4th 848 (2006).
[18] *Locklin v. City of Lafayette*, (1994) 7 Cal.4th 327 at 367
[19] *Paterno v. State of California*, (2003) 113 Cal. App. 4th 998; 6 Cal.Rptr.3d 854 (2004)
[20] *Id.*

system and its ***purpose to divert the natural flow for flood protection, reclamation, and navigation*** were themselves "reasonable"; 4) the damage was "proximately caused" by the public improvement as designed and constructed; and 5) if the ***State failed to undertake any studies to determine its adequacy to meet the waters the State proposed to route against it***. *[emphasis added]*

The appellate court declared: "the State, but not the District, is liable for *Paterno's* damages, because of the unreasonable plan within the SRFCP which accepted the levee as built without any measures to ensure it met design standards."[21]

Key factors in assessing the "reasonableness" of the risk inherent to the state's levee project included the large size of the project, the lack of direct benefit to the plaintiffs from the project, the feasibility of alternatives, and the fact that the ***state benefitted as a whole from the decision not to fund the levee improvements that would have prevented the breach***,[22] with foreseeability a supplemental issue considered. *[emphasis added]*

- **Foreseeability:** To demonstrate foreseeability, "it is ***enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action – or inaction – in the face of that known risk."***[23] Here, the Council has been made aware through public comments of the potential flood risk of identifying levees that will not receive or be prioritized for State funding, so ignorance may not be a justifiable defense in court for the State if sued under inverse condemnation laws for flood damage and deaths attributed to implementation of DLIS. *[emphasis added]*

STATE LEGISLATIVE INTENT FOR FLOOD PROTECTION

Delta Levees Program

Since 1982 when the Department of Water Resources (DWR) and the U.S. Army Corps of Engineers (USACE) produced a joint report on the Delta levees recommending the Delta-specific PL 84-99 as the minimum levee standard, it has been the goal of the State, local, and Federal government to work towards achieving this standard. Progress towards that goal has steadily occurred since the State Legislature established the Delta Levee Maintenance Program (Levee Subventions) in 1973 and the Delta Levees Program (Special Projects) in 1988. Delta levee improvements have accelerated in recent years due to the influx of a half a billion dollars of bond funding in 2006 for Delta flood risk reduction.

The Subvention Program has been a critical factor in maintaining the levee HMP standard for eligibility in the Federal funding for Disaster Assistance which typically pays for 75 percent of the recovery costs following a flood event and subsequent levee failures.

[21] *Paterno*, 6 Cal.Rptr.3d 854 (2004) at 864.
[22] *Id*. at 1017; Locklin, 7 Cal 4th at 368-369.
[23] Arreola v. County of Monterey, (2002) 99 Cal. App. 4th 722 at 744 (cited in *Paterno*)

In addition, nearly all levees in the Delta are above the 100-year floodplain, and levee failures due to high tides or high flows has been essentially eliminated and most, if not all, SPFC Project levees in the Delta already *exceed* PL 84-99 standards, thanks in large part to the success of the Delta Levees Program.

Utilizing a very efficient process of partnering with the local flood control agencies for levee maintenance and improvements under the Subventions Program, the risk of flooding in the Delta has dramatically improved as evidenced in the reduced number of levee failures during the flood events in 1997 and 2006.[24] Under the Subventions Program, the flood protection projects are funded initially by the local agencies and reimbursed by the State once the costs are submitted by the local agency. [25] Because the State only pays a percentage of the total cost, and the local agencies fund 100 percent of the work up front, there is great incentive for the local agencies to perform the work in the most cost effective and efficient manner possible.

A primary goal of the Proposed Project should be to design a State funding prioritization strategy for Delta levees that recognizes and builds upon the one of the few proven successes in the Delta over the past 35 years – the Delta Subventions Program.

Flood Risk Reduction Investments

As a result of the levee failures in New Orleans after Hurricane Katrina, the State Legislature passed and the California voters approved a $4 billion bond (Proposition 1E) in 2006 to rebuild and repair California's most vulnerable flood control infrastructure to protect people and property. Prop. 84 enhanced these flood risk reduction efforts with an additional $800 million for flood control projects approved by voters.[26]

Since 2006, an unprecedented number of flood protection projects were completed by DWR, the Board and reclamation districts. Funds for Delta Subventions levee projects covering approximately 650 miles of levees, both Project and non-Project, has been in the $10-16 million annual range since the passage of Prop. 1E and 84.

However, flood management funding available through Proposition 84 and 1E will soon be gone while the State's costs for the ongoing maintenance and operation of the SPFC have increased under the new standards mandated by the Legislature; e.g., 200-year urban level of protection; remapping of new flood hazard zones by FEMA; and more intensive levee maintenance enforcement by the Corps.

[24] Central Valley Flood Protection Board, D*elta Levees Maintenance Subventions Program Guidelines: Procedures and Criteria* (2011). Available at http://www.water.ca.gov/floodsafe/fessro/docs/subventions_guidelines.pdf
[25]DWR Flood Management, Flood Control Subventions Program Section webpage. Available at: http://www.water.ca.gov/floodmgmt/fpo/sgb/fcs/
[26] Resources Agency, "Bond Accountability: Proposition 1E Overview" webpage. Available at http://bondaccountability.resources.ca.gov/p1E.aspx

Leverage Federal Financing. Non-project levees are an important component of the integrated Delta flood control system. These levees only become eligible for Federal emergency funds (PL 84-99) once they pass an initial inspection assuring they meet the Corps's engineering, maintenance and qualification criteria. Once upgraded to PL 84-99 and active within the program, flood damage to these levees is eligible for repair using federal funding. The Federal disaster payments under PL 84-99 typically pay for 75% of the recovery costs following a flood event and subsequent levee failures. The potential for upgrading non-project levees to meet these criteria and then funding their ongoing maintenance should therefore be an important long-term consideration in the DLIS.

Central Valley Flood Protection Plan Implementation

In addition to placing flood protection bond measures before the voters, in 2007 the State Legislature also passed legislation requiring DWR to develop a Central Valley Flood Protection Plan (CVFPP) currently being implemented by the CVFPB, local Regional Coordination Committees, and DWR.[27]

The CVFPP is intended to be a comprehensive new framework for system-wide flood management and flood risk reduction in the Sacramento and San Joaquin River Basins,[28] and includes an extensive habitat Conservation Strategy component.[29] This plan provides conceptual guidance on reducing the risk of flooding for more than one million people and $70 billion worth of homes, businesses, and infrastructure in the Central Valley with a goal of providing a 200-year level of protection to urban areas[30] and reducing flood risks to small communities and rural agricultural lands.

DLIS should focus on achieving flood standards adopted by the State Legislature as public safety priorities.

LAND USE RESTRICTIONS

County Land Use Authority

RDs and LMAs do not have jurisdiction over land use on property protected by the levees they maintain. Land use is primarily regulated by counties; however, both the DSC and DPC also have some limited land use authority in the Delta. Most of the Delta is considered to be Special Flood Hazard Areas (SFHA) and participating in FEMA's National Flood Insurance Program (NFIP) by each Delta county adopting and enforcing floodplain management ordinances on new

[27] Central Valley Flood Protection Board, Central Valley Flood Protection Plan (CVFPP).Available at http://www.water.ca.gov/cvfmp/docs/2012%20CVFPP%20FINAL%20lowres.pdf.
[28] CVFPB, "Central Valley Flood Protection Plan: Major Physical and Operational Elements of Preliminary Approaches and State Systemwide Investment Approach" (2011). Available at: http://www.cvfpb.ca.gov/CVFPP/07_CVFPP-SSIA_elements_brochure_12dec2011.pdf
[29] DWR, 2012 Central Valley Flood Protection Plan Attachment 2: Conservation Framework (2012). Available at: http://www.water.ca.gov/floodsafe/fessro/docs/flood1_conservation_framework.pdf
[30] DWR, Urban Level of Flood Protection Criteria (2013) Available at: http://www.water.ca.gov/floodsafe/urbancriteria/ULOP_Criteria_Nov2013.pdf

construction in a floodplain that meets or exceeds FEMA's minimum criteria to reduce future flood damage in the 100-year floodplain. Urban areas must also meet 200-year flood protection by 2025 pursuant to the package of flood bills passed by the State Legislature in 2007 after Hurricane Katrina.

Delta Protection Act

In 1992, the State Legislature established the Delta Protection Commission (DPC) and created the "Legal Delta" by defining Primary and Secondary Zones for purposes of allowing for growth in the urban Secondary Zone and guiding the conservation and enhancement of the natural resources, agricultural production, and recreation in the Primary Zone through implementation of a Land Use and Resource Management Plan that restricts land uses within the Primary Zone. As such, local governments in the Delta are required to submit proposed amendments to their general plans to the Commission, which must be consistent with criteria with the Delta Protection Act and DPC Land Management Plan. Projects in the Delta that are considered "covered actions" must also be consistent with the DSC's Delta Plan. Consequently, it should be noted that most of the Delta acreage is already much more regulated and restricted in terms of growth and land uses than other areas of the state.

Property Assessments for "General Benefits" Prohibited

As subdivisions of the State of California, reclamation and levee districts must comply with Prop. 218 when raising assessments on property owners to fund flood management projects and levee maintenance.

Proposition 218[31] is a California Constitutional Amendment that restricts local government's ability to impose property assessments in several important ways. First, it requires local government agencies to conduct a vote of the affected property owners for any proposed new or increased assessment before such rates can be levied.

Secondly, it tightens the definition of the two key findings necessary to support an assessment: special benefit and proportionality. An assessment on any given parcel must be in proportion to the special benefit conferred on that parcel: "No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel." [32]

An assessment can be imposed only for a "special benefit" conferred on a particular property.[33] A special benefit is "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large."[34]

[31] (Articles XIIIC and XIIID) (approved by voters in November 1996)
[32] Art. XIII D, § 4, subd. (a).) (7)
[33] Art. XIII D, §§ 2, subd. (b), 4, subd. (a))
[34] Art. XIII D, § 2, subd. (i)

Because only special benefits are assessable, and public improvements often provide both general benefits to the community and special benefits to a particular property, the assessing agency must first "separate the general benefits from the special benefits conferred on a parcel" and impose the assessment only for the special benefits.[35]

The benefits associated with expanding floodplains and riparian habitats are general benefits shared by the public at large. And to the extent Delta habitat projects proposed in the Delta Plan or DLIS will be credited under the Biological Opinions as Reasonable and Prudent Alternatives for meeting ESA permit requirements, then they are special benefits to the State, federal government, and export water contractors – not the Delta property owners.

DLIS should consider these local funding constraints, particularly their limitations in terms of passing on to local agencies the costs associated with meeting co-equal goals for habitat and conveyance facilities for water supply reliability through a levee investment strategy.

CCVFCA RECOMMENDATIONS ON SCOPE AND CONTENT OF DLIS PROJECT

The specific areas the Association recommends the NOP's scope and content be modified and expanded include:

1. **Purpose and Need** – Difficult for CCVFCA to provide comprehensive comments regarding whether the scope and content of the EIR are sufficient without a detailed description of the Need and Purpose is, particularly what a successful Proposed Project would hope to achieve if fully implemented. Restating the co-equal goals or statutes is insufficient; should provide the who, what, where, why, and how specific objectives are to be implemented and describe what outcomes would be considered a success.
2. **Public Safety** – The main job of levees and other flood control structures is to protect people and property, yet the NOP fails to identify Public Safety as a category than needs to have impacts analyzed and mitigated. Increases in flood risk in the Delta, liability, and emergency response effectiveness should be the primary focus of the EIR.
3. **Health** – One of the three reasons for the State originally reclaiming the Delta's swamp and overflow lands was health concerns over malaria, yet health is not identified as one of the resource areas with the potential for significant environmental impacts. In addition, previous analyses of Delta habitat projects indicate that the individual and cumulative impacts to water quality in the Project Area would be significant enough to create significant adverse health effects, so should also be a category in the DLIS EIR.
4. **State Objectives** – By narrowly focusing on the co-equal goals adopted in the 2009 Delta Protection Act, the NOP is not as comprehensive as it should be in identifying the State's flood protection and Delta objectives as defined over the years by the State Legislature in

[35] Art. XIII D, § 4, subd. (a)

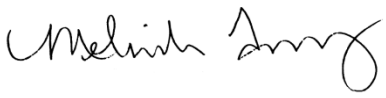
various public safety, species protection, and water supply statutes. CVFPP, Prop. 1E and 84.

5. **Jurisdiction** – There other State agencies with authority and legislative mandates in the Delta. Neither DSC nor DLIS should supersede these jurisdictions, or create any powers and duties that are in conflict with the statutory authority and responsibilities of these other State agencies.
6. **Alternatives** – The Delta levee knowledge and expertise of local engineers should be utilized to develop a broad range of alternatives. Recommendations on levees and flood protection in the DPC's ESP should be one of the alternatives analyzed.
7. **Flows** – The analysis of hydraulic changes and flood flow capacities should be robust and focus of strategy.

CONCLUSION

Thank you for the opportunity to comment on the scope of the development of a Delta Levee Investment Strategy. CCVFCA also supports the NOP comments on the DLIS Policy Project submitted by Gilbert Cosio MBK Engineers, who serves as a consulting engineer to many Delta RDs and the Association. As a representative of many local levee maintaining agencies in the Delta, the Association is committed to working cooperatively with the Council as this project progresses.

Sincerely,



Melinda Terry
Executive Director